

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 00-5212, 5213**

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**MICROSOFT CORPORATION,**

**Defendant-Appellant,**

**v.**

**UNITED STATES OF AMERICA and  
STATE OF NEW YORK, *et al.*,**

**Plaintiffs-Appellees.**

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**REPLY OF AMERICA ONLINE, INC.,  
IN SUPPORT OF MOTION  
FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE**

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America Online, Inc. (“AOL”) respectfully submits this Reply to Appellant Microsoft Corporation’s (“Microsoft”) Response to AOL’s Motion for Leave to Participate as Amicus Curiae.

As noted in AOL’s initial filing, the United States and the State parties have consented to AOL’s participation as an amicus. They continue to do so in their Response, appropriately citing “the importance of th[is] case.” Appellees’ Joint Response at 1. Microsoft, on the other hand, opposes AOL’s participation as amicus on the ground that “it would be totally improper for AOL to attempt to supplement [its] testimony [at trial] with additional facts outside the record.” Microsoft Response (“MR”) at 3.

The Court might reasonably wonder why Microsoft assumes that any submission by AOL would attempt to “supplement” the record. The answer, we respectfully submit, lies in Microsoft’s evident worry about how AOL’s participation as amicus in this case would assist the Court. While we, of course, do not intend to attempt to supplement the evidence on appeal, we do believe AOL’s unique Internet expertise and involvement in Microsoft’s conduct that is the subject matter of this case will enable AOL to assist the Court in evaluating the broader perspective of what is at issue in this very important case.

Specifically, AOL is uniquely positioned to respond to the arguments repeatedly raised by Microsoft throughout this case that the conduct found by the District Court is, in any event, simply a matter of the past that does not justify the imposition of an effective forward-looking remedy. We believe that AOL’s perspective, as a leader in the development of the Internet and the owner of Netscape, would be an important contribution to this Court’s evaluation of the appropriateness of the District Court’s judgment and remedy. That is not “supplement[ing]” the record, as Microsoft attempts pejoratively to describe it; rather it is providing the Court with a valuable perspective for evaluating the District Court’s judgment and remedy.

Nor is there any basis to support Microsoft’s suggestion that the Court deviate from its well-established amicus rules and impose a special one-brief limit, above and beyond the limits already contained in Circuit Rule 29(d) and the October 11 scheduling order. AOL recognizes that other prospective amici bring to the case other, different valuable perspectives and insights.<sup>1</sup> Counsel for

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<sup>1</sup> Microsoft suggests that amicus participation in this case should be subject to special limitations because some of the prospective amici are also its business competitors. See, e.g., MR at 3. But an entity’s status as a competitor of one of the principal parties has never been considered a barrier to amicus participation. Indeed, in a case (such as this one) that is of substantial importance to entire sectors of the national economy, a rule excluding would-be amici solely on the grounds that

AOL are mindful of their obligations under Circuit Rule 29(d) and the October 11 order, and will file a separate brief only if there is a counsel-certifiable need for a separate filing. In short, the amicus rules already in place will ensure that amicus participation by AOL (and any other entities) is neither “unfair to Microsoft [nor] burdensome to the Court.” MR at 2.

Accordingly, AOL respectfully asks that the Court grant its motion for leave to participate as an amicus curiae, without special limitations beyond those already reflected in Circuit Rule 29(d) and the October 11 Order.

Respectfully submitted,

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November 1, 2000

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they are competitors would risk depriving the Court of the views of the most knowledgeable and helpful amici.

## CERTIFICATE OF SERVICE

I, Theodore W. Ulyot, hereby certify that on this 1st day of November 2000, I caused a true and correct copy of the foregoing Reply of America Online in Support of Motion for Leave to Participate as *Amicus Curiae* to be served upon the following:

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